In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1874

ANGELO ROSSI, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1974. The petition for a writ of certiorari was filed on June 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners are entitled to a new trial because of the alleged failure of the government to disclose that a witness in the instant case had been granted immunity in another case (*United States* v.

DeCarlo, 458 F. 2d 358 (C.A. 3)) tried several years before the instant prosecution.

2. Whether the trial court abused its discretion at a post trial hearing (on a motion for a new trial on the ground of newly discovered evidence) when it refused to call a witness whose testimony before a Senate Subcommittee appeared to contradict his testimony at trial on the peripheral issue of when he first became aware that he could not identify a codefendant who was severed during the trial.

STATEMENT

In October of 1972, following a jury trial in the United States District Court for the District of New Jersey, petitioners Angelo Rossi, Howard Silverman and William Silverman were found guilty of conspiring to transport stolen securities in interstate commerce (count 1), in violation of 18 U.S.C. 371. Petitioner Rossi was also found guilty of various substantive counts (counts 3, 6, 7, 8 and 9) charging the transportation of stolen securities in interstate commerce, in violation of 18 U.S.C. 2 and 2314. Howard Silverman was sentenced to a term of two years' imprisonment and William Silverman to a term of three years' imprisonment. Petitioner Rossi was sentenced to a term of three years' imprisonment, and a fine of $5,000 on count one and one year prison terms on each of counts three, six, and seven, to run consecutively to each other and to the term imposed on count one. In addition, the court sentenced Rossi to two years' probation on counts eight and nine, to begin on the date of Rossi's release on parole. The

court of appeals affirmed, 485 F. 2d 260, certiorari denied, 415 U.S. 994.

On July 13, 1973, the government's principal witness at trial, Gerald Zelmanowitz, testified before the United States Senate permanent sub-committee on investigations. He testified that in exchange for his testimony in the trial of Angelo DeCarlo, see *United States* v. *DeCarlo*, 458 F. 2d 358, the government had indicated that he would receive immunity for the matters about which he testified in that case (S.T. 134; App., *infra*).[1] His testimony before the Senate Subcommittee could also be read to imply that he had been induced to testify against DeCarlo by promises of government intercession on his behalf in a civil suit that he was litigating against the Internal Revenue Service at that time[2] (S.T. 134–135; App., *infra*).

Alleging that this testimony contradicted that given at trial, petitioners requested a new trial on the ground of newly discovered evidence. A post-trial hearing was held, at which the testimony of Herbert Stern, then the United States Attorney for the District of New Jersey, and David Hinden and Richard Langway, Assistant United States Attorneys, was ad-

[1] "S.T." refers to the Senate testimony, "T" to the trial testimony, and "P.T.H." to the testimony at the post trial hearing. We are lodging with the Clerk a copy of the Senate hearing; we have also reprinted certain pages of that hearing as an appendix to this brief.

[2] Petitioners' quotation at the top of page 5 of their petition is not reflected in the transcript of the sub-committee's hearings, from which it purports to come (S.T. 134–135; App., *infra*). Moreover, while the statement arguably accurately paraphrases Zelmanowitz's testimony, the statement does not indicate that Zelmanowitz was referring to the DeCarlo trial, rather than the instant prosecution.

duced. Mr. Stern testified that although Zelmanowitz had requested assistance in tax matters, he had been repeatedly told that it was not possible. Moreover, these discussions had occurred prior to and in connection with the DeCarlo prosecution, not the instant one (P.T.H. 122–125). Mr. Zelmanowitz, who had been relocated for his safety after his testimony against DeCarlo, was not called back as a witness at the post trial hearing.

ARGUMENT

1. Petitioners, relying primarily upon *Giglio* v. *United States,* 405 U.S. 150, contend that they are entitled to a new trial because the government failed to disclose that Zelmanowitz was testifying under an alleged expectation of lenient treatment. Petitioners claim that Zelmanowitz' testimony before the Senate Subcommittee revealed that his testimony in the instant case was influenced by government promises of immunity and intercession on his behalf in tax litigation in which he was involved. Thus, according to petitioners, since the government did not inform them or the jury of these promises, they are entitled to a new trial under *Giglio.* This claim is without merit.

Zelmanowitz' testimony (before the Senate Subcommittee) as to his tax problems, after the instant trial, did not state that any promises had been made him; at most, he implied that the resolution of his tax case was a factor in his decision to testify in the *DeCarlo* case (S.T. 134–135; App., *infra*). Petitioner's claim that Zelmanowitz testified that he had received "assurances that another pending case in which he

was involved would be 'resolved'" (Pet. 5) is misleading, because it refers to the prior *DeCarlo* trial (see footnote 2, *supra*). Moreover, Mr. Stern testified at the post trial hearing that in fact Zelmanowitz' request for help in his tax case had been unequivocally denied (P.T.H. 122–125). The trial court was thus clearly warranted in finding that the government had made no promises concerning Zelmanowitz' tax difficulties in exchange for his testimony in the instant case (Pet. App. B, 30); and such findings should not be set aside unless they are "wholly unsupported by evidence." *United States* v. *Johnson*, 327 U.S. 106, 111–112.

Petitioner's claim that Zelmanowitz was testifying under a promise of immunity is similarly without factual basis. His testimony (before the Senate Subcommittee) that "I would be treated in a manner that I would receive immunity and not be prosecuted for these disclosures" (S.T. 134; App., *infra*) is accurate when it is placed in the context of the *DeCarlo* trial, to which he was referring. He was not promised immunity for his testimony in the instant case, and had in fact pled guilty to his part in the conspiracy prior to trial (see Pet. App. B, 34–35).

Petitioners' reliance on *Giglio* is thus misplaced. There, this Court held that where one Assistant United States Attorney had promised a co-defendant that he would not be prosecuted if he testified and a second prosecutor had allowed that witness to testify that no promises had been made in exchange for his testimony, a new trial was necessary. In the instant case there were no promises made by the government in

exchange for the witness' testimony. The fact that Zelmanowitz had received immunity for his testimony in a different case, prosecuted some two years before, clearly does not bring this case within the ambit of *Giglio*. As this Court noted, a new trial is not automatically required "whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict * * *' " (*Giglio, supra,* 405 U.S. at 154).

2. Petitioners contend that they were denied Due Process of Law by the refusal of the court to require the production of Zelmanowitz at the post trial hearing. There is no merit to this claim.

During the initial moments of Zelmanowitz' testimony at trial, he indicated that he could not identify the then co-defendant Anthony Salerno. As a result, Salerno's case was severed and the trial of the other defendants proceeded. On cross examination, Zelmanowitz stated that he could not remember having been shown photographs of Salerno (Pet. App. B, 36). Before the Senate Subcommittee the following colloquy occurred:

> Mr. FELDMAN: Can you please explain why in one of those cases you failed to identify Anthony Salerno?
>
> Mr. ZELMANOWITZ: I notified the Assistant U.S. Attorney prosecurint [sic] the case that I didn't know the person known to be Anthony Salerno as the person I knew and was in business with. For whatever reason they proceeded with it. A couple of days before the trial, in preparation for it, I again was shown photographs and was not able to identify him as such.

> In the courtroom I stated this was not the Anthony Salerno I did business with. [S.T. 224; App. 14.]

In order to clarify Zelmanowitz' contradictory statements on this collateral point the U.S. Attorney as well as the two assistants who handled the prosecution were put under oath at the post trial hearing, and were questioned by the judge who presided over the trial, and cross examined by defense counsel. All three of the prosecutors emphatically testified that they first learned that Zelmanowitz would not be able to identify Salerno when it occurred at trial (P.T.H. 125, 144, 149).

The court then made the following finding (Pet. App. B, 37–38):

> Here I find there was no sham; that the Government did not know that the individual defendant Salerno would not and could not be identified by Zelmanowitz until Zelmanowitz took the stand, and the moment that that lack of identification was brought to the attention of the Government, action was taken by both the Government and the Court to call this to the attention of the other defendants and the jury. I make this finding (as to the time of disclosure to the Government of Zelmanowitz' failure of identification) not only by virtue of the testimony of the two United States Attorneys and Mr. Stern, but by the very improbabilty of the United States having been in possession of that information and yet risking its entire case on the disclosure from the stand by Zelmanowitz. It is not conceivable to me that the United States would have jeopardized its position and case, by knowing what Zelmanowitz' testimony was to be, and still per-

mitting the disclosure to be made from the witness stand as it was.

Further, Zelmanowitz was cross-examined at great length by the defendants on his failure of identification and this inured to the defendants' credit, rather than to their disadvantage.

In the situation of this case, where the court had ample opportunity to observe the witness' demeanor at trial, where the witness had been relocated for his protection, and where the point at issue is at best collateral to the already completed trial, the trial judge acted within his discretion in not recalling Zelmanowitz. Cf. *United States* v. *DeSapio,* 456 F. 2d 644 (C.A. 2), certiorari denied, 406 U.S. 933. *DeMarco* v. *United States,* 415 U.S. 449, upon which petitioners rely, is not to the contrary. The Court there held that where a factual question (whether a plea bargain, which admittedly took place, occurred prior to or after a co-defendant's testimony) is dispositive of the issue whether a new trial is necessary, that factual issue should be considered by the district court rather than the court of appeals. The holding of *DeMarco* was followed in the instant case. Petitioners' reliance on *Mesarosh* v. *United States,* 352 U.S. 1, is also misplaced. There the witness' credibility was "wholly discredited" by the subsequent revelation of a series of bizarre untruths he had told under oath. By contrast, in the instant case the witness' subsequent testimony, although contradictory on a peripheral element (when he was first aware he could not identify a codefend-

ant), reaffirmed the substantive content of his testimony as it dealt with the role of organized crime in the trafficking of stolen securities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.

APPENDIX

Pages 132–135, 224–225 from the stenographic transcript of Hearings before the United States Senate, Permanent sub-committee on investigations, on July 13. 1973:

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* * * * *

In late 1968 I was arrested in Miami Beach, Florida in the process of trying to sell some stolen securities. I was brought before a U.S. Magistrate where bond was made but I was restricted and held in custody because I had to be delivered to the Federal court in New Jersey for leaving that jurisdiction while I was under a previous bond. Over a period of 30 days I journeyed from Miami to Newark with Federal marshals. At the end of this journey, when I finally arrived in Newark, I was approached by two agents of the FBI. I was very quickly and briefly told of a situation where the FBI had received a letter from a Mr. Louis Saperstein. This letter stated that Mr. Saperstein had borrowed large sums of money from Angelo DeCarlo—approximately a [133] half-a-million dollars—Daniel Cecere and others; that he had been severely beaten for the failure to pay certain interest and principal payments to them; and that he was in fear for hie life. This letter arrived in the FBI offices approximately at the same time that Mr. Saperstein died from poisoning. It was later determined that his death was a suicide, although at the time the FBI believed he had been murdered.

The FBI agents had approached me because Louis Saperstein and I were partners in a firm called Societe de la Bourse. This firm was used primarily for the purchase, sale and analysis of foreign securities in the manner I have de-

scribed. I told the FBI agents that I did not wish to discuss Saperstein's business in relation to DeCarlo, although I was aware of the matter. I did not wish to get involved because of my knowledge of DeCarlo's connection with the mafia and I knew him to be a high-placed figure in organized crime.

At this meeting there was very little time to discuss the matter. They quickly said that things can be arranged; that my safety could be insured. I told them that I would speak to them at some other time but not now and I proceeded to go down into the courtroom where I made bond and eventually went back to my home at 8 Wachtung Road, Short Hills, New Jersey. In approximately 30 days I was again approached by this team from the FBI and many hours were spent in discussing the possibility of my testifying before a closed grand jury and in secrecy.

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At meetings with U.S. Attorneys I was told that if I would testify, certain things could be provided for my safety that (a) I would be helped in relocating myself and my entire family to a site of my choice and at that time we spoke of going to Europe; (b) new identifications would be created for me and my family and a past history of our lives would also be created; and (c) they would provide subsistence to my family during the course of my testimony because I would not be working or have access to my funds, but spending all of my productive time with the Federal Bureau of Investigation and the U.S. Attorney in preparing this case. I would be treated in a manner that I would receive immunity and not be prosecuted for these disclosures.

Additional [sic], at that time I had a suit against the IRS being heard before Federal District Court Judge Augelli in Newark, New Jersey, in relation to certain funds of mine that had been seized via jeopardy assessment.

This case involved interest equalization taxes and I was proceeding before the Federal judge to receive relief from the Internal Revenue Service and force the IRS to give certain documents to me to relieve myself of interest equalization taxes.

It was determined that if my tax case could be resolved, that this money would be of vital necessity in order for me to relocate because of the tremendous expense that would be incurred by myself and that these funds would also be necessary [135] to help create a new life for myself. Eventually, after innumerable hours in discussion with the U.S. Attorneys and the FBI, between myself and my family, which included my two children, my mother-in-law and father-in-law who lived with me and my wife, and after very persuasive conversations, we finally decided, my family and I, that yes, I would testify for the United States Government, relying on the government's promises.

Preparation for the cases were [sic] immediately begun. I went before the grand jury where indictments were handed down and Angelo DeCarlo, Joseph Polvorino, Daniel Cecere and others were indicted. It is at this time that I met with an individual who identified himself to be from a special unit of the Justice Department, whose sole duty was the relocation of witnesses such as myself. A list was prepared by us which detailed the following: (a) that a birth certificate would be created in the name of my choice, or a name that they would give me and placed within the city hall of the city that they would choose; (b) that my school records would be collected from the schools that I had gone to from public school through college and that these would be converted into school records with the new name that was to be given and would be placed in new schools of their choice; (c) an employment history would be created for me; and (d) a new military back-

ground would be created for me. In addition, I would be given a social security card, a military identification card, driver's license, birth certificate, * * *

* * * * *

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Mr. FELDMAN: Have you testified in Federal court against other organized crime figures?

Mr. ZELMANOWITZ: I have.

Mr. FELDMAN: Could you identify those figures?

Mr. ZELMANOWITZ: Angelo Rossi, Gil Beckley, Joseph Green, Howard Silverman, and others.

Mr. FELDMAN: What was the nature of the charges that were brought against those defendants?

Mr. ZELMANOWITZ: Transporting of stolen securities across State lines, amongst others.

Mr. FELDMAN: Can you please explain why in one of those cases you failed to identify Anthony Salerno?

Mr. ZELMANOWITZ: I notified the Assistant U.S. Attorney prosecurint [sic] the case that I didn't know the person known to be Anthony Salerno as the person I knew and was in business with. For whatever reason they proceeded with it. A couple of days before the trial, in preparation for it, I again was shown photographs and was not able to identify him as such. In the courtroom I stated this was not the Anthony Salerno I did business with.

Mr. FELDMAN: So under penalty of perjury you now state under oath you did not know the Anthony Salerno who was a defendant in that trial?

Mr. ZELMANOWITZ: Absolutely.

Mr. FELDMAN: Mr. Zalmanowitz, in our executive session [225] in June, the week before July 4th, we were talking about some of the businesses in which organized crime was in-

volved. You have alluded to the fireworks business, I believe?

Mr. ZELMANOWITZ: Yes.

Mr. FELDMAN: Would you briefly recite some facts on that very topical area?

Mr. ZELMANOWITZ: I was just trying to show that there are so many ways that organized crime earns money. I chose what I thought would be a ludicrous one for you. It happens to be a fact that a week or two before July 4th literally hundreds of truckloads of fireworks are brought into Brooklyn, New York, for example, and certain segments and certain sections of Brooklyn are delegated to members of organized crime or their friends. No one can sell fireworks in that area.

As ludicrous as it sounds and as small as it may seem, I can assure you that there are millions of dollars earned every July 4th by the sale of fireworks in Brooklyn, New York.

Mr. FELDMAN: So you can't stand on a corner in Brooklyn, New York, and sell fireworks without getting the approval of organized crime?

Mr. ZELMANOWITZ: I wouldn't say on any corner. In many sections of Brooklyn, no, you cannot.

Mr. FELDMAN: Do you have knowledge of any other foreign bank accounts established to hide illegal business transactions from the view of American authorities?

U.S. GOVERNMENT PRINTING OFFICE: 1974